No. 88-684 (2)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY *et al.*, MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION *et al.*, PEABODY HOLDING COMPANY, INC., *et al.*, and TENNESSEE VALLEY AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS PEABODY HOLDING COMPANY, INC., AND PEABODY COAL COMPANY

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INTRODUCTORY STATEMENT REGARDING QUESTIONS PRESENTED

As explained in this brief, Questions 1 and 2 in the petition for certiorari are not presented by this case.

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Respondents Peabody Holding Company, Inc., and Peabody Coal Company respectfully urge that the petition for certiorari be denied.[1] While these respondents be-

[1] The stock of Peabody Holding Company, Inc., is owned as follows: Newmont Mining Corporation (49.97%), Bechtel Investments, Inc. (15.01%), The Boeing Company (15.01%), Eastern

lieve that the Court of Appeals correctly decided this case, they submit a separate brief to show that Questions 1 and 2 in the petition are not presented by this case.

STATEMENT OF THE CASE

Statutory Scheme

The Clean Air Act of 1970 established a scheme whereby the U.S. Environmental Protection Agency ("EPA") was directed to establish national ambient air quality standards ("NAAQS") for air pollutants to protect the public health and welfare (§ 109), and the States were required to develop and submit state implementation plans ("SIPs") to attain and maintain the NAAQS within their borders (§ 110).[2] EPA was directed to approve those SIPs if they met specified requirements (§ 110(a)(2)). EPA has adopted NAAQS for various pollutants, including particulate matter and sulfur dioxide ("SO_2"), and the States have developed SIPs to achieve those standards. In the 1977 Amendments to the Act, Congress adopted a new provision (§ 169A) that established a goal of remedying impairment of visibility in "class I Federal areas" (*e.g.*, national parks) and directed EPA to adopt regulatory requirements for SIPs to make "reasonable progress" toward meeting that goal.

Associated Securities Corp. (15.01%), and the Equitable Life Assurance Society of the United States (5%). All of the stock of Peabody Coal Company is owned by Peabody Holding Company, Inc. In addition, these respondents have the following subsidiaries or affiliates which are not wholly owned: North Antelope Coal Company, Squaw Creek Coal Company, Yaamba Joint Venture, Dominion Terminal Associates, Tecumseh Coal Corporation, Yankeetown Dock Corporation, Rail to Water Transfer Corporation, and Kayenta Mobile Homes Park.

[2] Sections 109 and 110 of the Act are codified at 42 U.S.C. §§ 7409 and 7410, respectively. The U.S.C. citations for the other sections of the Act referred to herein may be found in the Table of Authorities.

Also in 1977, Congress adopted new provisions dealing with interstate air pollution. Section 110(a)(2)(E) requires that, as a condition for approval, a SIP must contain "adequate provisions" prohibiting sources in that State from emitting pollutants that will "prevent attainment or maintenance" of the NAAQS in another State or will "interfere with measures required to be included" in another State's SIP to prevent significant deterioration of air quality or to protect visibility. Section 126(b) authorizes any State to petition EPA for a finding that any major source in another State emits or would emit pollutants that would violate the prohibition of § 110(a)(2)(E).

Administrative Proceedings

In 1980 and 1981, the States of Pennsylvania, New York, and Maine filed petitions with EPA under § 126(b). Those petitions presented EPA with three distinct claims. First, both Pennsylvania and New York contended that emissions of SO_2 from all major sources in seven Midwestern States were, after conversion in the atmosphere of the SO_2 to sulfate (a particulate) and long-range transport of such sulfates by air currents, preventing attainment and maintenance of the NAAQS for *particulate matter* in Pennsylvania and New York. In reviewing this claim, EPA considered at length the evidence on sulfate and total suspended particulate matter ("TSP") levels in Pennsylvania and New York and the extent to which those levels could be attributed to SO_2 emissions in the Midwestern States. 49 Fed. Reg. 34851, 34862-65 (Sept. 4, 1984); 49 Fed. Reg. 48152, 48153, 48156-57 (Dec. 10, 1984) (App. B to Pet. at B-7 to -8, B-21 to -24). It found that "out-of-State sources from the named [Midwestern] States do not contribute significantly to violations of the [particulate matter] NAAQS" in Pennsylvania and New York. 49 Fed. Reg. 34865; see also 49 Fed. Reg. 48152, 48156, 48157 (App. B to Pet. at B-8, B-21, B-24).

Second, Pennsylvania claimed that SO_2 emissions from certain specified sources in southeastern Ohio and northwestern West Virginia were preventing attainment and maintenance of the NAAQS for SO_2 in areas of southwestern Pennsylvania. EPA rejected this claim on the ground that Pennsylvania had presented no actual monitoring data to show any violation of the NAAQS for SO_2 in southwestern Pennsylvania and that the modeling analysis submitted was inadequate to demonstrate such a violation or significant out-of-State contributions to a predicted violation.[3] 49 Fed. Reg. 34859-61; 49 Fed. Reg. 48153, 48156 (App. B to Pet. at B-6 to -7, B-22).

Third, Maine contended that SO_2 emissions from the Midwest were, through conversion to sulfate and long-range transport, causing regional haze that interfered with visibility at Acadia National Park in Maine. EPA rejected this claim on the legal ground that Maine had not adopted any of the visibility protection measures actually required by EPA's regulations to be included in SIPs, and that, moreover, EPA's regulations implementing § 169A did not require SIPs to include any measures to address regional haze. 49 Fed. Reg. 34865-66; 49 Fed. Reg. 48153, 48154 (App. B to Pet. at B-9, B-11). Since Maine thus did not and could not claim interference with measures "required to be included" in its SIP to protect visibility (as provided by § 110(a)(2)(E)), EPA denied Maine's petition for failure to state a claim under §§ 110(a)(2)(E) and 126(b).

In summary, EPA concluded that its review of the best available data failed to show that pollution sources in the named Midwestern States were preventing attainment or maintenance of the NAAQS for particulate matter or SO_2 in the petitioning States or interfering

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[3] Dispersion modeling employs mathematical formulas to estimate airborne concentrations of pollutants resulting from a source's emissions.

with visibility protection measures *required to be included* in those States' SIPs. 49 Fed. Reg. 34866; 49 Fed. Reg. 48157 (App. B to Pet. at B-24).

Proceedings in the Court of Appeals

In the Court of Appeals, Pennsylvania abandoned its broad claim of interstate impacts on the NAAQS for particulate matter and presented only its limited claim that SO_2 emissions from certain sources in Ohio and West Virginia were preventing attainment and maintenance of the NAAQS for SO_2 in areas of southwestern Pennsylvania. App. A to Pet. A-13 to -14. The court rejected that claim, upholding EPA's technical determination that the evidence was insufficient to support it. *Id.* at A-14 to -15. New York did initially present the broad claim of interstate impacts from the seven Midwestern States on the NAAQS for particulate matter in New York; but EPA, during the pendency of the case, revised the particulate matter NAAQS to change the indicator pollutant from TSP to a different indicator. As a result, New York sought a remand to allow it to submit new data relevant to the revised NAAQS, and the court remanded New York's petition for that purpose. *Id.* at A-16. Finally, Maine pressed its visibility claim, but the court rejected that claim on the legal ground that, since Maine's SIP did not contain regional haze measures, Maine "failed to make even a threshold showing of entitlement under § 126(b)." *Id.* at A-13.

INTRODUCTION TO AND SUMMARY OF ARGUMENT

Petitioners claim that this case "involves the single largest and best documented case of transboundary air pollution occurring within the United States"—*i.e.*, the alleged impact of SO_2 emissions from the Midwestern States on "very high ambient sulfate levels, regional haze and acid rain" in the Northeastern States. Pet. at 8. In this context, they assert that this case presents the broad

legal issue of EPA's duty, either in general or in reviewing a § 126(b) petition, to review the SIPs of the Midwestern States to determine their adequacy under § 110 (a)(2)(E) to prevent such impacts in the Northeastern States. They contend that EPA's denial of their petitions "effectively precludes any abatement" of these interstate pollution problems. *Id.*

In fact, however, the petition before this Court does not involve the broad impacts alleged by petitioners and does not present the broad legal issue regarding EPA's duty to review the Midwestern SIPs to determine their compliance with § 110(a)(2)(E). The only claims that remain before this Court are Pennsylvania's limited claim of interstate impacts on the NAAQS for SO_2 in southwestern Pennsylvania and Maine's claim of interstate impacts on visibility in Maine. Both these claims were rejected by EPA and the Court of Appeals on independent grounds that are wholly sufficient to support their determinations and that would obviate any possible need for EPA to review the overall adequacy of the Midwestern SIPs.

Furthermore and in any event, in response to the § 126(b) petitions, EPA undertook a careful scrutiny of the petitioning States' arguments and evidence and denied those petitions on the merits. That inquiry is essentially the same substantive inquiry as would be involved in reviewing the adequacy of the Midwestern SIPs under § 110(a)(2)(E) with respect to the impacts in the petitioning States. Hence, even assuming *arguendo* that EPA had a duty to review the Midwestern SIPs under § 110(a)(2)(E), its consideration and denial of the § 126(b) petitions constituted, in effect, the same substantive review which the petitioning States would have obtained under § 110(a)(2)(E).

ARGUMENT

As noted above, Pennsylvania in the Court of Appeals abandoned its broad claim of interstate impacts from the seven named Midwestern States upon the NAAQS for particulate matter, and New York's similar claim was remanded to allow the submission of new data relevant to the revised NAAQS for particulate matter. New York does not seek review in this Court, and no party has sought review of the Court of Appeals' remand of New York's petition. Thus, the only claims before this Court are Pennsylvania's more limited claim relating to the NAAQS for SO_2 and Maine's visibility claim, and those claims do not raise the broad issues and impacts alleged by petitioners.[4]

Pennsylvania's claim in the Court of Appeals related only to the impact of SO_2 emissions from certain sources in Ohio and West Virginia on the NAAQS for SO_2 in areas of southwestern Pennsylvania. EPA had no need to review the overall adequacy of the Midwestern SIPs to deal with this claim. It denied that claim on the technical ground that there were no monitoring data showing a violation of the NAAQS for SO_2 in southwestern Pennsylvania and that the modeling submitted was inadequate. The Court of Appeals upheld that independent technical determination, and review is not sought of that aspect of the court's decision. Thus, disposition of Pennsylvania's claim does not involve any need to resolve the question of EPA's duty to review the Midwestern SIPs under § 110(a)(2)(E).

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[4] This case does not involve "acid rain" (more correctly known as acid deposition) at all. As EPA found, there are no NAAQS, "prevention of significant deterioration" requirements, or visibility protection measures dealing specifically with acid deposition, and hence acid deposition *per se* is not encompassed within the prohibition of § 110(a)(2)(E). See 49 Fed. Reg. 48153 (App. B to Pet. at B-5 to -6).

Maine's claim likewise does not present that broad issue. Maine argued that regional haze resulting from Midwestern SO_2 emissions was impairing visibility in Acadia National Park. EPA rejected that claim on the ground that regional haze measures were not included in Maine's SIP and were not required by EPA's visibility protection regulations to be included in SIPs, and that hence Maine's petition failed to state a claim for relief under §§ 110(a)(2)(E) and 126(b). The Court of Appeals affirmed that legal determination. If that threshold ruling was correct, there was no reason for EPA to go any further in reviewing the adequacy of the Midwestern SIPs under § 110(a)(2)(E), and there is thus no need for this Court to consider EPA's duty to make such a review.[5]

In any event, even if the petitioners' claims did raise the broad issue of the impact of SO_2 emissions from the Midwestern States on sulfate or particulate matter levels in the Northeast, this case is not appropriate for review by this Court. To begin with, the Court of Appeals

[5] Petitioners do challenge the correctness of EPA's and the Court of Appeals' determination on that threshold legal issue. While they do not deny that EPA's visibility protection regulations under § 169A of the Act do not require regional haze measures to be included in SIPs, they claim that that fact does not negate their entitlement to relief under § 126(b). Pet. at 12-13. Apparently, petitioners' argument is that the Act itself, in § 169A, requires SIPs to include regional haze measures. *Id.* As the Court of Appeals held, however, this argument constitutes an untimely attack on EPA's visibility protection regulations, which were adopted in 1980. App. A to Pet. at A-13 n.3. Section 307(b)(1) of the Act requires that judicial review of EPA regulations be sought within 60 days of their publication, and Maine never challenged EPA's 1980 regulations for failure to include regional haze measures. Petitioners do not challenge the Court of Appeals' determination that their challenge to EPA's regulations is untimely. Moreover, to the extent that Maine is claiming that EPA has a nondiscretionary duty under § 169A to adopt regional haze regulations, that claim is the subject of separate litigation currently pending in the First Circuit. Pet. at 13 n.8.

properly upheld EPA's interpretation of the Act to the effect that § 110(a)(2)(E) did not require a wholesale review and reevaluation of all existing SIPs to determine their adequacy *per se* to prohibit impermissible interstate impacts, and that petitions under § 126(b) likewise did not trigger a requirement for such extensive, full-scale review of existing SIPs. App. A to Pet. at A-8 to -12.

Moreover, even if it were assumed *arguendo* that EPA had a duty under § 110(a)(2)(E) to review the adequacy of the Midwestern SIPs to prevent impermissible impacts in the petitioning States, the petitioning States in effect have had such a review in response to their petitions. EPA gave close scrutiny to the evidence and arguments submitted by the petitioning States regarding the impacts potentially attributable to Midwestern sources, and it found that the best available evidence failed to show that sources in the named Midwestern States were having impermissible impacts under § 110(a)(2)(E) in the petitioning States. 49 Fed. Reg. 34866; 49 Fed. Reg. 48157 (App. B to Pet. at B-24).[6] As petitioners themselves admit (Pet. at 13) and as the Court of Appeals assumed (App. A to Pet. at A-9), the inquiry for decision under § 126(b) is the same substantive inquiry as that under § 110(a)(2)(E).[7] Thus, the

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[6] For instance, in reviewing the claims of Pennsylvania and New York regarding the alleged interstate impacts on the NAAQS for particulate matter, EPA found that: (a) total sulfates from all sources did not constitute a significant portion of TSP levels in those States on occasions when the NAAQS were violated; (b) sulfates transported from Midwestern sources were not shown to constitute a significant portion of annual sulfate levels in the petitioning States; (c) the magnitude of various geographic components of transported sulfates had not been adequately defined; and (d) therefore sources in the named Midwestern States could not be said to contribute significantly to violations of the NAAQS in the petitioning States. 49 Fed. Reg. 34865; 49 Fed. Reg. 48153, 48157 (App. B to Pet. at B-8, B-24).

[7] Petitioners assert that the decision below was inconsistent with the decision of another court of appeals that the substantive in-

careful inquiry and review that EPA undertook in response to the § 126(b) petitions was no different in substance from that which would be involved in reviewing the adequacy of the Midwestern SIPs under § 110(a)(2)(E) insofar as the impact on the petitioning States is concerned. Accordingly, EPA's denial of the § 126(b) petitions on the ground that emissions from the Midwestern States were not shown to be having impermissible impacts under § 110(a)(2)(E) in the petitioning States was a rejection of the only conceivable violation of § 110(a)(2)(E) about which the petitioning States had standing to complain. In these circumstances, EPA's failure to state explicitly that the Midwestern SIPs had adequate provisions to prevent violations of § 110(a)(2)(E) in the petitioning States was, at worst, harmless procedural error and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, respondents Peabody Holding Company, Inc., and Peabody Coal Company urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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quiry under §§ 126(b) and 110(a)(2)(E) is the same. Pet. at 13-14. This assertion makes no sense, since the court below did assume, for purposes of deciding the case, that the substantive inquiry is the same under both provisions. App. A to Pet. at A-9.